SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 532

THOMAS CAMPISI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS CAMPISI, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The opinion of the Court below (Exhibit A, *infra*), has not yet been reported.

Jurisdiction

The judgment of the Court below was entered on September 9, 1957. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

Constitutional Provisions, Statutes and Rules Involved

Amendment V—Capital Crimes: Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes Involved

TITLE 21, U. S. C., SECTION 174

"§174. Same; penalty; evidence

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

TITLE 26, U. S. C., SECTION 4706(a)

"§4706. Forfeitures

"(a) Unstamped packages.—All unstamped packages of narcotic drugs found in the possession of any person, except as provided in this subpart, shall be subject to seizure and forfeiture, and all the pro-

visions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subpart and the persons upon whom the taxes under this subpart or sections 4721 to 4726, inclusive, are imposed."

TITLE 18, U. S. C., SECTION 371

"§371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Questions Presented

I

Whether the error of the Trial Court in completely failing to charge the jury on the conspiracy count as to the jurisdictional pre-requisite, *i.e.*, that at least some one overt act must be shown to have been committed in the EDNY or that the conspiracy was in fact formed in the EDNY before they could convict, deprived petitioner of the most basic rights of due process under the 5th and 6th Amendments.

II

Whether the petitioner was not placed twice in jeopardy for the same crime in violation of the 5th Amendment by the use by the Government in the second trial in the EDNY of the same evidence upon which petitioner was convicted in the first trial in the District of Newark.

III

Whether petitioner could receive the fair trial guaranteed him by the due process concepts guaranteed all defendants tried under the rules of our jurisprudence by the gratuitous injection of an obviously deliberate and leading question and answer technique calculated to adduce before the jury highly prejudicial and picturesque testimony and innuendoes such as that the Campisi family were all engaged in the narcotic traffic; that petitioner's son was wanted by local police on a burglary charge; that alleged contraband in nowise connected with petitioner was found in the Campisi home; the use for the second time by the Government of evidence of circumstances of petitioner's arrest; and the use for the second time by the Government of evidence that petitioner attempted to escape.

IV

Whether the Trial Court erred in submitting the case to the jury on Count 3 (the substantive count) and Count 1 (the conspiracy count) in view of the paucity of the evidence adduced by the Government to support them.

Statement

Petitioner, among others, was named as a defendant in two separate indictments filed in two separate jurisdictions, based on certain alleged narcotic transactions. The petitioner was first tried and convicted on the one filed in the United States District Court for the District of Newark. He was there charged in two counts, with two separate sales of heroin on July 19, 1955, in Newark, N. J. (See Ex. C annexed hereto).

After his trial, conviction and sentence on this Newark case, he was then placed on trial in the United States District Court for the EDNY on the indictment filed there which charged him in Count 3 with a substantive sale of heroin on April 20, 1955, and in Count 1 with a conspiracy to deal in narcotics covering the period from January 1, 1955, to August 3, 1955. Upon conviction, he received a total sentence of eight years on both counts.

FIRST: The only guide furnished to the jury on this most essential jurisdictional point, *i.e.*, whether any crime was committed in the EDNY by petitioner was the general one in any conspiracy case. At page 242(R) the Court charged:

> "There can be no determination by you that there was a conspiracy unless you find that at least one of those overt acts took place, an act flowing from the conspiracy. One overt act is sufficient, coupled with a finding that there was a conspiracy."

This charge was far from adequate. The conspiracy charged flowed to and from the EDNY, into and through the SDNY and to and from New Jersey, according to the Government. The majority of the overt acts are alleged to

have taken place outside the EDNY (#2, 8, 9, 10 and 11 in Newark; #6 in the SDNY). Thus, it was imperative that the jury be given more of a beacon light as to jurisdiction and venue than the general charge above quoted. The Court attempted to meet this vital pre-requisite to the jury's deliberation by telling the jury (p. 245R): "If you find * * * that at least one of the overt acts was committed, then your verdict will be guilty as to the defendant on Count 1 of the indictment."

The charge is completely barren of any allusion, direct or indirect, to the essential direction to the jury that before it can convict the defendant (who was the only one on trial) they must find as a fact that some of the overt acts charged was committed in the EDNY or that they must find as a fact that the conspiracy was formed in the EDNY.

The jury was thus left completely at sea in the midst of a three district omnibus conspiracy meshed together by the Government by the use of the "prosecutor's delight" from isolated substantive offenses alleged to have taken place in three separate jurisdictions.

The Circuit Court of Appeals dismisses the assertion of this point by petitioner in the Court below with the statement (p. 2313 (Op.)): "The omission was at most an inadvertence. Had appellant requested such an instruction, or excepted on that ground to the charge as given, *we have no doubt the trial judge would have supplied the omission and the verdict would have been the same.*" But no exception was taken, no such request was submitted and appellant's counsel indicated no criticism whatever of any part of the charge. To reverse on such a point as this would be a travesty of justice. *United States* v. *Trenton Potteries*, 273 U. S. 392, 403-4.

To fail to take judicial cognizance of this fatal omission in the most important part of a criminal trial, the Court's charge, would be a travesty of justice, particularly in the light of the many other errors which occurred in this trial.

The error is so fundamental as to warrant this Court in considering it *sua sponte*. Rule 52(b) of the Federal Rules of Criminal Procedure indeed provides that:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

In *United States* v. *Capitol Meats, Inc.* (C. C. A. 2nd, 1948), 166 Fed. (2d) 537, 538, cert. den. 334 U. S. 812, the Court pointed out:

> "Where the error is so fundamental as not to submit to the jury the essential elements of the offense of which the defendant has been found guilty, an appellate court should notice it sua sponte, Screws v. United States, 325 U. S. 91."

And in *Kawalcuk* v. *United States* (C. A. 6th, 1949), 176 F. 2d 873, 877, the Court pointed out:

> "This Court can nevertheless consider a plain and palpable error, even though not objected to."

The prejudicial effect of such omission to charge, of course, cannot be known. As stated by Judge Learned Hand in *United States* v. *Andolschek* (C. C. A. 2nd, 1944), 142 F. 2d 503, 506, where the Court reversed a judgment of conviction:

> "We cannot of course know, as the record stands, how prejudicial the exclusion may have been, but

> that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U. S. C. A. §391."

This Court, in *McNabb* v. *United States* (1943), 318 U. S. 332, 341, set forth the following guide:

> "The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see Nardone v. United States, 308 U. S. 338, 341, 342, * * * this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions."

SECOND: Petitioner was tried twice for narcotic dealings; first in Newark and then in the EDNY. In the Newark trial petitioner's conviction was obtained by the use of certain testimony of certain alleged transactions in Newark on July 19, 1955 (See Ex. C, Newark Indictment). On this charge he was convicted and sentenced.

Thereafter, he was placed on trial in the EDNY on similar charges. The same evidence used by the Government in the Newark trial to obtain his conviction there was reintroduced against him; the same witnesses who had previously testified against him were again used by the Government.

Overt acts 10 and 11 in the EDNY trial are the same as the substantive offenses on which he had already been convicted.

Petitioner could not possibly take the stand in his own defense in the trial below, when the Government for the second time paraded before the second jury the same proof of the guilt for which he already stood convicted. The inevitable opening question on cross-examination as to a prior conviction would disclose to the second jury *his guilt in law and in fact* of the commission of overt acts 10 and 11, the last important climax overt acts charged against him in the very conspiracy count *on which he was then being tried;* guilt of appellant before the second jury of the July 19, 1955 transactions, the last stages in the conspiracy, ergo he is guilty of all the prior and collateral facets of the conspiracy whether or not connected with them by any evidence.

The right to take the stand in one's own defense is one of the most sacred in our jurisprudence. To deprive petitioner of a free and untrammeled decision in this respect violates every concept of the safeguards provided an accused under the Constitution and particularly under the 5th Amendment.

THIRD: This Court, in the exercise of the supervisory power over criminal trials should review this case as it did not meet the minimum requirements of due process (*Nardone v. U. S.*, 308 U. S. 338, 341, 342).

(a) Petitioner was the sole defendant on trial in the EDNY. The very first Government witness, a trained narcotic agent, pursuant to what can fairly be characterized as a planned question-and answer technique in this double pronged prosecution brought against petitioner by the Government, was permitted over objection to testify as follows (App. 13 & 14):

"Q. Did you have a conversation with Santagata with respect to a man named Compy? (Motion for mistrial denied)"

The poisonous question is again repeated. And a trained Government Narcotic Agent testified in reply:

"During this conversation with Santagata I told him that I had read in the newspaper about a man named Compy who had been murdered in Newark. He said that he knew the man. He knew the whole family, that in fact the name of the man was Compisi and that they were the people we were doing business with in Newark."

Motion for mistrial again denied. Then the agent continued:

"Santagata continued to say that he could not get pure heroin from these people because they were four brothers and they had many mouths to feed and he said we can't blame them for adulterating the heroin because there are so many mouths to feed and so much money to be paid out."

Certainly, the testimony of this Government agent about reading about a man named Compy who had been murdered in Newark placed appellant in an impossible position before the jury, particularly as we have elsewhere in the trial the testimony of Sgt. Palardy about arresting appellant's son, Peter, in connection with a burglary in New Jersey and the finding of a syringe and powder in a room of the house where appellant was apprehended (See Subd. C hereof).

The allusion to the unproven statement that the entire family was dealing in narcotics was destructively prejudicial.

Any person, no matter his station in life or how heinous the crime of which he stands accused or even convicted, is entitled to more constitutional protection than was afforded appellant here. A greater cloak of constitutional safeguard may well be required in trials involving convicted persons.

It certainly cannot be said that all these cumulative errors are harmless.

In *Kotteakos* v. *United States*, 328 U. S. 750, 1946, at page 764, the Supreme Court said:

> "and the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. United States v. Socony Vacuum Oil Co., supra (310 U. S. at 239, 242, 84 L. ed 1176, 1178, 60 S. Ct. 811); Bollenback v. United States, supra (326 U. S. 607, Ante, 350, 66 S. Ct. 402)."

And again, at page 765:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

(b) The Trial Court, over objection, permitted the Government, after using such evidence to secure petitioner's conviction in the Newark case, to *re-use* it against him in the Brooklyn case, having no possible connection with the charge on which petitioner was being tried and calculated solely to inflame and prejudice the jury against him to the effect that:

(1) Petitioner's son Peter was a burglar;

(2) petitioner owned narcotic material and equipment of a contraband nature; and

(3) that petitioner attempted to escape.

Sgt. Palardy testified in the prior Newark trial to the apprehension of petitioner in Newark, N. J., on January 22, 1956. (Exhibit "D" hereto is a transcript of his testimony.) Whatever semblance of validity there may have been to the use of such testimony in the first trial in Newark the Government went further and not only duplicated Sgt. Palardy's testimony but added that of two of his brother-officers. Nothing could be more calculated to influence a jury against a defendant and divert it from a true and dispassionate consideration of the evidence in this case. Motions for a mistrial were made and denied on this line of inquiry.

The use of any such testimony as to escape or flight at all must be cloaked with great caution. See *Hickory* v. *United States*, 160 U. S. 408, where the Court said it was not error to admit, evidence of an attempt to escape, the Court laid down this admonition, however, citing *Peo.* v. *Ryan*, 79 N. Y. 593, at page 417. "There are many reasons for such conduct, consistent with innocence, that it scarcely comes

up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon surrounding circumstances. The Trial Court failed to charge anything on this point.

Local police officers went to petitioner's home to arrest his son, Peter, and to look for evidence of a burglary. They had no wararnt for petitioner, weren't looking for him and so far as their testimony indicates, they did not know that he even existed. Because, as Sgt. Palardy put it, petitioner's actions were "over suspicious, we kept him under observation *while we were waiting for his son to come home.*" After petitioner's son, Peter, came home, they "decided to also take petitioner to Police Headquarters in Newark".

Petitioner was not under arrest when he broke away. Sgt. Palardy for the second time was permitted to testify that he "captured" petitioner "at the point of a gun". He was even permitted to testify that they had previously made a search of the house and that he had to kick in a door in the process of apprehending petitioner (R. 210).

Detective Lanno, of the Newark Police, was permitted to testify that he made a search of petitioner's house and that in the closet in a separate bedroom, in a grey suit, he found a small cardboard container containing a syringe, a hypodermic needle, a small silver spoon with a curved handle and a packet of white powder. When the officers asked petitioner if he owned it he denied knowledge or ownership of the packet or grey suit. However, in the then cast of the case, the harm was done.

Whether the initial use of such extraneous, highly inflammatory and strongly prejudicial evidence in the Newark case was proper or not is now moot. The Government utilized it in the Newark trial as part of the quantum of proof which resulted in petitioner's conviction there and subsequent sentence on the July 19, 1955 transactions. It had no proper place for the second time in the trial in the Court below and its admission was grave error.

The grave harm to petitioner's right to a finding by the jury of guilt or innocence solely on the issue involved and not on oblique and extraneous matter, was compounded by the manner in which the Government treated it in summation (Appx., page 30):

> "An officer drew a gun on him and said: By God, you better come with me or I am going to shoot, and if he didn't say that in words, I am sure that is what everybody realizes when you see a gun pointed at you. And why is that important? Does an innocent man flee from the law? Does an innocent man go free confident of the fact that he can disprove the charges against him? Of course you and I know that the latter is true. An innocent man isn't brought in at gun point. That's the reason that those two officers took the stand."

This error alone, aside from all the other constitutional imperfections that attended almost every step of this double-pronged prosecution warrants a reversal herein. (See *Pinkerton* v. *U. S.*, 328 U. S. 640, *Krulewitch* v. *U. S.*, 336 U. S. 440, *McNabb* v. *U. S.*, and *Kotteakos* v. *U. S.*, *supra.*)

FOURTH: (a) There was no evidence connecting petitioner with the substantive offense on which he was con-

victed. This substantive offense charged a sale of narcotics on April 20, 1955, in the EDNY by one Charles Campisi, Ugo Giampaoli, Aniello Santagata, and petitioner. So far as the record shows, petitioner was never in the EDNY on this date or at any other time. He could be convicted only on the theory of aiding and abetting. The sale took place at the home of the defendant Santagata in the EDNY. The name of Campisi was never mentioned in this case until May 25, 1955, one month after the alleged sale. As the Court of Appeals states at page 2308 of its opinion:

> "In order to justify the submission of the substantive offense to the jury it was necessary for the prosecution to prove the appellant associated himself with the venture in order to establish that he aided and abetted the commission of the offense charged. United States v. Peoni, 2 Cir., 100 F. 2d 401."

The Government failed to meet this test.

Restricting the proof to this substantive count, the Government's case, conceding to it every possible inference tending to show guilt of the crime charged showed no more than the following:

After some preliminary skirmishing between the co-defendant Giampaoli and a narcotic agent about a purchase of narcotics, the only tangent to petitioner is a trip which two of the co-defendants made to New Jersey where, it is claimed, they came into contact, among others, with the Campisi brothers.

Petitioner entered a car driven by Santagata and then returned to another car allegedly driven by his brother. Both cars proceeded to a building in Newark, N. J., which was entered by Giampaoli, Santagata and petitioner.

Neither Giampaoli nor Santagata testified at the trial so there is no testimony whatsoever as to the nature of any conversations or happenings at this time. Santagata and Giampaoli then returned to New York. Thereafter, a sale of narcotics was made to a narcotic agent in th EDNY.

The Court of Appeals states (p. 2309, opinion) that: "the jury was entitled to find that, from the time Santagata and Giampaoli left Springfield Gardens that afternoon until their return, they had made no other stops than above set forth nor had they met anyone other than the two Campisis."

This is pure surmise applied to a criminal trial of a substantive offense. The entire case of the Government on this substantive count is based on mere surmise, inference, innuendo and supposition. There was no direct evidence whatsoever to support it. Petitioner was not shown to have associated himself in any venture resulting in any subsequent narcotic dealings in this case insofar as this count is concerned. The proof does not meet the test of the *Peoni* case and the indictment should have been dismissed.

(b) The conspiracy count is fatally defective inasmuch as, if anything, it is made up of isolated substantive offenses in which petitioner was not involved, with the exception of the July 19, 1955, transaction in Newark (on which he had already been convicted and sentenced). See *U. S.* v. *Falcone*, 311 U. S. 205, 85 L. Ed. 128, 61 S. Ct. 204, 109 F. 2d 579, C. C. A. 2, 1940; *U. S.* v. *Peoni*, C. C. A. 2, 1938, 100 F. 2d 401; *Tinsley* v. *U. S.*, C. C. A. 8, 1930, 43 F. 2d 890, 892, 893; *U. S.* v. *Koch*, 1940, C. C. A. 2, 113 F. 2d 982.

To demonstrate how petitioner has been engulfed in a morass of facts gathered by the Government by some novel

theory of osmosis, it is pertinent to see how the Government, as the initiator of these prosecutions, has proceeded herein. Petitioner has received five years on a conspiracy charge alleged to have run from January 1st to August 3, 1955 in the Eastern District of New York. Dissection of the conspiracy count as demonstrated herein in Exhibit B hereto, shows that there was no participation in the conspiracy charged, by petitioner and that there was not and could not have been such conspiracy in law or in fact.

Not satisfied with gathering separate and disparate transactions participated in by different and other persons into a continuing conspiracy, the Government even injected into the trial below some oblique sale by Santagata in the vicinity of 34th Street and 3rd Avenue, in the Southern District of New York on August 1st, 1955. This last occurrence was not even alleged as any overt act in the conspiracy. Yet it was used to bind petitioner.

Assuming, arguendo, that petitioner might have participated in some of these transactions in Newark, N. J., he might be guilty of aiding and abetting defendants who directly participated in sales in Newark. He was not legally guilty of any running conspiracy in the Eastern District of New York, extending over a period of seven months, to deal in the importation of heroin into the United States contrary to law and thereafter to sell it.

Assuming the ultimate in the Government's proof, petitioner could be no more than a seller to his co-defendants who were buyers. If parties deal at arms-length; and terms are arrived at as a result of bargaining from adverse positions petitioner could not have any proprietory interest in the disposition of any narcotics after they may have left his possession.

He could have no stake in what was done with them. He would have no knowledge as to whether they were for the consumption of the co-defendant-buyers and, if for resale, in what quantities, in what quality and for what price.

Thus, under the principle of law in the *Falcone, Peoni, Koch* and *Tinsley* cases, *supra*, he could not be a co-conspirator or an aider and abettor under the facts of the record.

Exhibit B, we submit, demonstrates this conclusion.

To assume that every time Santagata has a quantity of narcotics that it came from petitioner flies in the face of all rules of evidence and constitutional safeguards. The denunciation of a Justice of the United States Supreme Court very appropriately fits this record:

> "Mr. Justice Jackson, concurring in Krulewitch v. United States, 1949, 336 U. S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790, said:
>
> " 'As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended, or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559 (68 S. Ct. 248, 92 L. Ed. 154), all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co. (2 Cir.), 167 F. 2d 54.' * * *
>
> When a prosecutor adds to an indictment a conspiracy count—'that darling of the modern prosecutor's

nursery'—his purpose is to take advantage of this very looseness of admissibility. Among the 'leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defendant acts or omissions which color the case against all.' Mr. Justice Jackson, dissenting in Lutwak v. United States, 1953, 344 U. S. 604, 73 S. Ct. 481, 492, 97 L. Ed. 593. See also 56 Col. L. Rev. 1112 (1956). In seeking that advantage, the prosecution assumes the risk that error may fatally weaken the entire interlocked structure."

Thus we have here a fatally weakened structure, lacking legal vitality from its inception and attempted to be strengthened by extraneous matter in violation of appellant's right to a trial guaranteed him by the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., October 2, 1957.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 382 — October Term, 1956.

(Argued June 5, 1957 Decided September 9, 1957.)

Docket No. 24500

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

THOMAS CAMPISI,

Defendant-Appellant.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, Judge.

Defendant Thomas Campisi appeals from a judgment of conviction and sentence on Counts One and Three of an indictment charging him with conspiracy to deal in heroin and with the substantive offense of a sale of heroin on

Exhibit A

April 20, 1955, in violation of 18 U. S. C. Section 371 and 26 U. S. C. Section 4705(a). Affirmed.

LEONARD P. MOORE, United States Attorney for the Eastern District of New York, Brooklyn, New York (Joseph F. Soviero, Jr. and Margaret E. Millus, Assistant United States Attorneys, Brooklyn, New York, of Counsel), for plaintiff-appellee.

DELANEY & DONOGHUE, New York City (Peter J. Donoghue, of Counsel), for defendant-appellant.

MEDINA, *Circuit Judge*:

The indictment in this case charged, in the first count, a conspiracy to traffic in narcotics between the two Campisi brothers, Charles and Thomas, Ugo Giampaoli, Aniello Santagata and others. The third count alleges a sale of heroin by the Campisis, Giampaoli and Santagata in Springfield Gardens, Long Island, New York, on April 20, 1955. Charles Campisi is a fugitive from justice and was not tried; Giampaoli and Santagata pleaded guilty to the conspiracy and other counts of the indictment and were duly sentenced. The jury found Thomas Campisi guilty of conspiracy and of the substantive offense as charged; he received a three-year sentence on Count One, and a five-year sentence on Count Three, to run consecutively; and he appeals.

Reversal of the judgment is sought because of the alleged insufficiency of the evidence to support a conviction on

either count, and because of various allegedly erroneous rulings by the trial judge, which are said to be so prejudicial as to have deprived appellant of a fair trial. It is also claimed that appellant has been subjected to double jeopardy because a sale of heroin by him in Newark, New Jersey, on July 19, 1955, was one of the overt acts enumerated in the conspiracy count, and evidence thereof was received, despite the fact that appellant had already been convicted of that specific substantive offense in the United States District Court for the District of New Jersey, and given a suspended sentence, sub nom, Gaspero Campisi.

The principal witness for the prosecution was Anthony Zirilli, a Government Narcotics Agent, who, in cooperation with a Special Agent, Dick Montana, often referred to in the testimony as Al, made his initial contact with Giampaoli on March 13, 1955. Giampaoli was the chef at the Bella Roma Restaurant in Hempstead, Long Island, and he lived in a two-story building, with a tenant upstairs, at 143-43 Springfield Boulevard, Springfield Gardens, in Queens. When Zirilli ascertained that Giampaoli had some connection with the traffic in narcotics, he and the other Narcotics Agents working with him embarked upon the undertaking of proceeding on a long range basis in the hope of uncovering the entire group with which Giampaoli was associated, and particularly "the source" from which Giampaoli obtained his supplies of narcotics. As we shall see, "the source" turned out to be the appellant, and his brother Charles Campisi, in Newark, New Jersey.

Posing as a large operator with many customers, Zirilli told Giampaoli at his home in Springfield Gardens on April

16, 1955 that he would soon be ready to make a substantial purchase of heroin and wanted to know how much Giampaoli could procure and what his source of supply would charge for the merchandise. Giampaoli said he would find out; and the following day Zirilli was informed that Giampaoli "could get any amount of heroin," that the quality would be approximately 80% pure and the cost $9500 for a full kilogram and from $2800 to $3000 for a quarter Kilogram. It was arranged that Giampaoli would procure a sample and this was delivered to Zirilli in two cellophane cigarette wrappers on April 18. Some dickering over the quality ensued, Zirilli heard some conversation on the subject by Giampaoli over the telephone, and he finally said he would take a quarter kilogram for $2300, after Giampaoli said "his man" would not take any less than $2000 and he had to make $300 profit for himself.

We now approach the evidence of the sale made on April 20, 1955, as alleged in Count Three. In order to justify the submission of the substantive offense to the jury it was necessary for the prosecution to prove that appellant associated himself with the venture in order to establish that he aided and abetted the commission of the offense charged. *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401.

The actual delivery of this large quantity of heroin was made to Zirilli by Giampaoli a little after 11 o'clock at night on April 20, 1955 at Giampaoli's home. After testifying to the preliminaries as above described, all Zirilli could add of his own personal knowledge was that, after the payment of the money Giampaoli could not at once say

where and when the heroin would be delivered, that pursuant to arrangement Giampaoli and Zirilli met at the race track, where Zirilli was told to come to Giampaoli's house for the heroin that evening. In other words, Giampaoli did not have the heroin in his possession and had to go somewhere to get it.

In the meantime, a number of other Narcotic Agents saw Santagata drive up to Giampaoli's home, while Zirilli was sitll at the race track; Giampaoli got in and Santagata drove his Lincoln, with New Jersey license plate PG11N, out to Kearney, New Jersey, where the Campisi brothers in a Chrysler car met them. Appellant got in the Lincoln and talked a while with Santagata and Giampaoli and then he got back in the Chrysler; there was much going up and down streets and around corners; then appellant got back in the Lincoln, which proceeded to a building at 458 South 11th Street, Newark, which appellant, Giampaoli and Santagata entered. Shortly thereafter they came out, and Santagata drove Giampaoli back to Giampaoli's home in Springfield Gardens, where Giampaoli, who did not have the heroin when he left Zirilli at the race track, pulled it out of his pocket and turned it over. From the testimony the jury was entitled to find that, from the time Santagata and Giampaoli left Springfield Gardens that afternoon until their return, they had made no other stops than above set forth nor had they met anyone other than the two Campisis.

The proof to sustain the conviction on the conspiracy count, much of which had considerable probative force in connection with the substantive charge, covered a wide

range. And we shall proceed briefly to relate the facts in chronological sequence.

When the first quarter kilogram was delivered by Giampaoli on April 20, 1955, Zirilli did not know of the existence of Santagata, but he had already complained of the quality of the heroin in the sample and he threw out a few hints respecting the possibility of larger transactions, perhaps in Mexico on a joint basis. These Giampaoli evidently passed along to Santagata, as Zirilli intended.

On May 16, 1955, Zirilli told Giampaoli he would soon be ready to purchase some more heroin. On May 18 they met at Giampaoli's home and there was the usual telephoning. At first Giampaoli was going to deliver the narcotics at the Bella Roma Restaurant later that evening, but when Zirilli met him at the Bella Roma Restaurant he said he couldn't do it until the next day. On May 19 they met again at the Bella Roma Restaurant and Giampaoli said "There was no need for him to go to Newark since his man was going to have the heroin with him." Accordingly, at Giampaoli's instructions, Montana drove Zirilli and Giampaoli to Flatbush Extension opposite the Mona Lisa Bridal Shop in Brooklyn. They went in and there was Santagata to whom Giampaoli introduced Zirilli for the first time. There Santagata asked Giampaoli if Zirilli was the one who had been talking about a trip to Mexico, but the subject was put off and they went out in the parking lot where, in the view of agent O'Connor, a Government witness at the trial, Santagata reached into the glove compartment of his car and delivered to Zirilli a brown paper package which contained the second quarter kilogram of heroin.

Exhibit A

It would have been possible to arrest Giampaoli and Santagata at once, but Zirilli and his superiors were after bigger game. The Campisis were implicated too, although their precise role was not yet completely established. But, on May 25, 1955, shortly after the purchase of the second quarter kilogram, in a conversation at Giampaoli's home Santagata told Zirilli that he and Giampaoli were getting the heroin from the Campisis in Newark.

The admission of this conversation, over objection, is one of the grounds urged for reversal. The question put to Zirilli called for a conversation with Santagata "about a man named Compy." The answer is:

> During this conversation with Santagata I told him that I had read in the newspaper about a man named Compy who had been murdered in Newark. He said that he knew the man. He knew the whole family, that in fact the name of the man was Campisi and that they were the people we were doing business with in Newark. * * * Santagata continued to say that he could not get pure heroin from these people because they were four brothers and they had many mouths to feed and he said we can't blame them for adulterating the heroin because there are so many mouths to feed and so much money to be paid out.

The identification of the Campisi brothers as the suppliers of the heroin which Giampaoli and Santagata had delivered on April 20 and May 19 was of course damaging to appellant, but it was nonetheless admissible as the declaration of a co-conspirator in furtherance of the conspiracy. *Lutwak* v. *United States*, 334 U. S. 604, 618-19; *Schine*

Exhibit A

Theatres v. *United States*, 334 U. S. 110, 116-17; *Glasser* v. *United States*, 315 U. S. 60, 74-5; *Logan* v. *United States*, 144 U. S. 263, 308-9. It was also admissible in support of the substantive charge on the same theory, as an admission by an agent in the course of the performance of his agency. *Delli Paoli* v. *United States*, 352 U. S. 232; *Lutwak* v. *United States*, *supra*, at 617-18; *Krulewitch* v. *United States*, 336 U. S. 440, 442-3; *Wolcher* v. *United States*, 9 Cir., 233 F. 2d 748, 750; 4 Wigmore, Evidence §1079. For all the sales were made pursuant to the single, comprehensive arrangement. Zirilli had made complaints about the quality of the heroin and Santagata was anxious to retain such a good customer as Zirilli for the benefit of himself and his co-conspirators; and this explanation might well lead Zirilli to believe that they were all doing the best they could under trying circumstances. We find no error here.

In May, June and July the government agents sought to make direct contact with appellant, but this was not possible until Santagata was induced to go to Mexico with Zirilli for the ostensible purpose of starting a new venture of importing large quantities of narcotics from some people who were supposed to have a vast supply on hand ready for export. Zirilli and Santagata left for Mexico on July 14, 1955. In anticipation of the trip Zirilli introduced Narcotics Agent Joseph Tremoglie as his brother-in-law, to take care of his narcotics business and his customers while he was away in Mexico with Santagata, and Zirilli insisted that Tremoglie be taken to meet the Campisis in Newark as in no other way would Zirilli be given assurance that all would go well in his absence. Accordingly, the

events of June 28, 29 and 30 relate to the purchase of another quarter kilogram of heroin for which Tremoglie paid $2500. Tremoglie went with Santagata to Newark on June 29, and he came back with the heroin; but he did not meet appellant as Santagata left Tremoglie in the car and in a short time delivered the narcotics. Zirilli was annoyed at this contretemps, Santagata had outsmarted him; but on July 19, 1955, Montana drove Tremoglie and Giampaoli out to Newark, and, as Tremoglie on this occasion positively refused to pay the money without being taken to the "source of supply," they parked the car, went up to appellant's home at 558 North 6th Street, Newark, where appellant was sitting on the stoop. They all went upstairs, Tremoglie paid the money and appellant took a package of heroin "out from under the seat cushion of the upholstered chair" and delivered it to Tremoglie. Prior to the delivery of the heroin Tremoglie had a conversation with appellant over the quality of the last purchase, with obvious reference to the transaction on June 29 when Tremoglie went to Newark with Santagata but was tricked into paying the money and accepting the heroin without meeting appellant. The conversation was: Tremoglie: "Is this stuff as good as the stuff I bought last time (June 29) when I came up with the old man with the gray hair (Santagata)?" Appellant replied, "Yes, the same thing. I had a piece and I broke it in four and this is one of the other four pieces." Appellant also volunteered some practical hints to be followed in the distribution of the merchandise at retail.

It is idle to suggest that appellant was no more than a seller and Giampaoli and Santagata isolated purchasers

acting for their own account and in no privity with appellant. The evidence discloses a narcotic ring operating on a large scale and with a highly organized system of avoiding detection. It is and has long been common practice to try conspiracy and substantive counts together in these narcotics cases and others, and we find the evidence sufficient to support the submission of both to the jury.

Nor does it matter that appellant was in Newark, and that there is no evidence that he was ever in the Eastern District of New York. Many of the overt acts scheduled in the conspiracy count of the indictment took place in the Eastern District, many of the sales were negotiated and the deliveries actually made in the Eastern District. This is sufficient. *Ford* v. *United States*, 273 U. S. 593, 619-20; *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392; *Krogmann* v. *United States*, 6 Cir., 225 F. 2d 220, 227; *United States* v. *Cohen*, 3 Cir., 197 F. 2d 26; *Ladner* v. *United States*, 5 Cir., 168 F. 2d 771; *Davis* v. *United States*, 5 Cir., 148 F. 2d 203.

While the trial judge instructed the jury that no verdict of guilty on the conspiracy count could be arrived at unless the jury found "that at least one of the overt acts took place," appellant now urges as a ground for reversal that the instructions did not specifically require a finding that an overt act took place in the Eastern District of New York. But the proof of a number of overt acts in the Eastern District, some in Queens and at least one in Brooklyn, was uncontroverted and of the most substantial character. The omission was at most an inadvertence. Had appellant requested such an instruction, or excepted on that ground

to the charge as given, we have no doubt the trial judge would have supplied the omission and the verdict would have been the same. But no exception was taken, no such request was submitted and appellant's counsel indicated no criticism whatever of any part of the charge. To reverse on such a point as this would be a travesty of justice. *United States* v. *Trenton Potteries*, 273 U. S. 392, 403-4.

Nor do we find error in the inclusion in the conspiracy count as an overt act, and the receiving of evidence of the transaction of July 19, 1955, despite the fact that appellant had already been tried and convicted of that offense in Newark and received a suspended sentence. The crime of conspiracy is a separate and distinct offense. *Harvey* v. *United States*, 2 Cir., 23 F. 2d 561, 564; *United States* v. *Shapiro*, 2 Cir., 103 F. 2d 775, 777. There is no double jeopardy; and the evidence was properly received.

Most of the other points require no discussion, we think; but appellant vigorously argues for reversal because the trial judge, over objection, received certain testimony by the West Orange, New Jersey police officers who arrested appellant at his new residence 265 14th Avenue in Newark on January 22, 1956. Armed with a warrant which authorized search of the Campisi residence for a suspect "in a robbery we had in our town" one of the police officers found appellant hiding under a bed. Although the warrant did not mention appellant he was taken into custody but he broke away from the arresting officer and, after some running around the house, dashed through an open window to the roof of the garage and jumped off the roof. But another police officer had been stationed in the rear of the

premises and appellant was again taken into custody as he was trying to climb over a fence.

It is not seriously disputed that this evidence of attempted escape is admissible as proof of a consciousness of guilt. The fact that this particular warrant did not call for the arrest of appellant is of course of no consequence. A warrant for the arrest of appellant, issued in the Eastern District on August 2, 1955, was outstanding, and it is of no moment that he was found by accident. What appellant complains of is that it came out that appellant's son Peter was the person the police officers were after, and that he was also arrested. Even more prejudicial, according to appellant's contention, is the receipt, over objection, of proof that in the room where appellant, clothed only in "an underwear top, a pair of slacks and a pair of shoes," was found under the bed, the police officers found a suit of clothes in one of the pockets of which was a small cardboard box containing a syringe, a hypodermic needle, a small silver spoon with a curved handle and a packet of white powder. When questioned by the police officers appellant denied that the suit was his or that he knew anything about the contents of the box.

The reference to Peter was too incidental to be of consequence against the background of the trial record as a whole. Moreover, the prosecutor with commendable fairness earnestly requested the jury "not to take into consideration the fact that Thomas Campisi's son was wanted by the police in New Jersey." The incident is too trivial to warrant reversal.

Exhibit A

As to the articles found in the box, it suffices to say that they were not only found in appellant's private home but in the very room where he was hiding under the bed when apprehended. Under the circumstances it was permissible for the jury to infer that these articles were in appellant's possession, in the absence of any proof to the contrary. Cf. *People* v. *Birnbaum*, 208 App. Div. 476, 203 N. Y. Supp. 697. But appellant did not come forward with any such proof; indeed, the defense rested at the close of the prosecution's case, and appellant requested an instruction, which the trial judge gave, to the effect that no unfavorable inference be drawn from the fact that he did not testify in his own defense. We find no error in any of the rulings made at the trial.

Affirmed.

EXHIBIT B

Date	Indictment	Charge	Court	Disposition	* Duplication in Conspiracy Count
4/18/55	Ct. 2— Giampaoli	Gave 14½ grains heroin to Agt. Zirilli.	EDNY	G.—Dismissed	Overt act #1 (Same as substantive count).
4/20/55	Ct. 3— Chas. Campisi Thos. " Ugo Giampaoli Aniello Santagata	Sale 8 ozs. heroin to Agt. Zirilli.	EDNY	Santagata—4 yrs. Dismissed as to G. Thos. Campisi convicted— 3 yrs. sentence.	Overt act #2 and #3 (Same 4 defts. Met in Newark 4/20/55—Sale same heroin)
5/19/55	Ct. 4— Ugo Giampaoli Aniello Santagata	Sale 8 ozs. heroin to Agt. Zirilli.	EDNY	Santagata—4 yrs.	Overt act #4—concealment same 8 oz. heroin. Overt act #5—Sale same heroin.
6/29/55	Ct. 1— Aniello Santagata Ct. 2— Ugo Giampaoli & Aniello Santagata	Ct. 1—Sold 8 ozs. illegally imported heroin. Ct. 2—Sale same drugs—No order form.	USDC, Newark.	Disposition unknown.	Overt act #6—SDNY., Conv. re: this sale. Overt act #7—sale—same heroin. Overt act #8—meeting re: sale Overt act #9—sale—same heroin.
7/19/55	Ct. 3— Gasperi (Thomas) Campisi Ct. 4— Gasperi (Thomas) Campisi Ugo Giampaoli	Ct. 3—sale 8 ozs. illegally imported heroin. Ct. 4—Sale same heroin—No order form.	USDC, Newark.	Thos. Campisi—5 yrs.—SS. Giampaoli—4 yrs. Santagata—4 yrs.	Overt act #10—Concealment 8 ozs. heroin in Newark. Overt act #11 (Sale same heroin).

* Count 1—EDNY—Conspiracy to violate narcotic laws among Charles Campisi, Thomas Campisi, Frank Giampaoli, Ugo Giampaoli and Aniello Santagata from Jan. 1, 1955, to August 3, 1955.

EXHIBIT C

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Criminal Number 266—55

UNITED STATES OF AMERICA

—vs.—

GASPERA CAMPISI,
UGO GIAMPAOLI, and
ANIELLO SANTAGATA

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT I

That on or about June 29, 1955, at Newark, in the District of New Jersey,

ANIELLO SANTAGATA

fraudulently, knowingly, and unlawfully sold a narcotic drug, to wit, eight ounces of heroin hydrochloride, after the same had been fraudulently, knowingly, and unlawfully imported and brought into the United States contrary to law, and the said ANIELLO SANTAGATA then and there well knew the said narcotic drug to have been so fraudulently and unlawfully imported and brought into the United States contrary to law.

Title 21, U. S. C., Section 174

Exhibit C

COUNT II

That on or about June 29, 1955, at Newark, in the District of New Jersey,

UGO GIAMPAOLI and
ANIELLO SANTAGATA

knowingly, willfully, and unlawfully sold a narcotic drug, to wit, eight ounces of heroin hydrochloride, said sale not being made in pursuance of a written order of the person to whom such narcotic drug was sold on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate, as required by Section 4705(a) of the Internal Revenue Code of 1954.

Section 4705(a), Internal Revenue Code, 1954
26 USCR Sec. 4705(a)

COUNT III

That on or about July 19, 1955, at Newark, in the District of New Jersey,

GASPERO CAMPISI

fraudulently, knowingly, and unlawfully sold a narcotic drug, to wit, eight ounces of heroin hydrochloride, after the same had been fraudulently, knowingly, and unlawfully imported and brought into the United States contrary to law, and the said GASPERO CAMPISI then and there well knew the said narcotic drug to have been so fraudulently and unlawfully imported and brought into the United States contrary to law.

Title 21, U. S. C., Section 174—1955

Exhibit C

COUNT IV

That on or about July 19, 1955, at Newark, in the District of New Jersey,

GASPERO CAMPISI and
UGO GIAMPAOLI

knowingly, willfully, and unlawfully sold a narcotic drug, to wit, eight ounces of heroin hydrochloride, said sale not being made in pursuance of a written order of the person to whom such narcotic drug was sold on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate, as required by Section 4705(a) of the Internal Revenue Code of 1954.

Section 4705(a), Internal Revenue Code, 1954.

EXHIBIT D

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Criminal 266–55

Re: U. S. A. v. THOMAS CAMPISI

(Trial February 21-24, 1956)

ELMER PALARDY, a witness for the Government, testified:

Q. Sergeant, by whom are you employed, sir? A. The Police Department, West Orange, New Jersey.

Q. How long have you been employed there? A. Eighteen years.

Q. Sergeant Palardy, do you recognize the defendant, Thomas Campisi? A. I do, sir.

Q. Will you tell us when and where you first saw him? A. On January 22, 1956 at his home at 265—14th Avenue, Newark, N. J.

Q. And where was he when you first saw him? A. He was under the bed.

Q. What happened then? A. We were searching, making a thorough search of the house, looking for his son, and evidence in a burglary.

Q. Don't go into that. I don't want to get any evidence in this case that might be prejudicial against the defendant so I caution you to only testify as to your contact with the defendant, Thomas Campisi. A. I found Mr. Campisi under the bed. I asked him what he was doing under the bed and he said he was painting the ceiling. His actions were over-suspicious and we kept him under ob-

servation, kept him in the house while we were waiting for his son to come home.

Q. What happened while you were there? A. While we were there a couple of his brothers came in the house. Mrs. Campisi was there, and his daughter and a younger brother came home. Later on about 5 p.m. his son Pete came home. We decided to take Mr. Campisi to police headquarters in Newark, N. J.

Q. What happened then? A. On the way down, as we started down the stairs with our prisoner, three other detectives from West Orange, myself, and Detective Lane of the Newark police, Mr. Campisi bolted through a back door and Detective Lane shouted telling me that, alerting me that Mr. Campisi had skipped.

Being thoroughly familiar with the house, previously making a search, I dashed back, but the man had started downstairs so I went out the front stairs again and I alerted two of our detectives downstairs, Sergeant Banford and Detective O'Rourke. Detective Banford and I ran around the rear of the building. The door was locked. We kicked the door in, ran upstairs, and in the meantime Mr. Campisi ran back upstairs through the kitchen, jumped out the kitchen window and ran across a roof, jumped off the roof and started through some back yards. I ran downstairs, out the front door, up the street to the corner. I didn't see Mr. Campisi at first and previously Mr. Campisi, as I said, had jumped from the roof. On the way back I apprehended him and captured him, climbing a fence, at the point of a gun.